RECORD
AND
BRIEFS

IN THE

Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al*,

Petitioners,

—v.—

HOBBY LOBBY STORES, INC., *et al*,

Respondents.

—and—

CONESTOGA WOOD SPECIALTIES CORP., *et al*,

Petitioners,

—v.—

KATHLEEN SEBELIUS, *et al*,

Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH AND THIRD CIRCUITS

AMICUS CURIAE BRIEF OF AJC (AMERICAN JEWISH COMMITTEE) IN SUPPORT OF NEITHER PARTY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... *ii*

INTEREST OF THE *AMICUS* 1

ARGUMENT 2

ALTHOUGH THE PETITIONS MEET THE CRITERIA FOR REVIEW, IT WOULD BE PREMATURE TO GRANT REVIEW ON THE PRESENT RECORDS 2

CONCLUSION 11

TABLE OF AUTHORITIES

CASES

Bolger v. Young Drug Products Corp., 463 U.S. 60 (1983) 3

Braunfeld v. Brown, 366 U.S. 599 (1961) 9

Catholic Charities v. Serio, 7 N.Y.3rd 510, 859 N.E.2d 232 (2006) 7

Catholic Charities of Sacramento v. Superior Ct., 32 Cal.4th 527, 10 Cal.Rptr.3rd 283, 85 P.3d 67 (2004) 7

Citizens United v. Federal Election Commission, 553 U.S. 310 (2010) 3

Commack Kosher Meats, Inc. v. Weiss, 294 F.3d 415 (2d Cir. 2002) 9

Conestoga Wood Specialties v. Sebelius, 724 F.3d 377 (3rd Cir. 2013) 4

EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610 (9th Cir. 1988) 9

Escambia County v. McMillan, 466 U.S. 48 (1984) 5

Gonzalez v. O'Centro Espirito Beneficiente Uniao Do Vegetal, 546 U.S. 418 (2006) 6,7

Hobby Lobby Stores, Inc. v. Sebelius, 870 F.Supp.2d 1278, 1291 (W.D. Okla. 2012), rev'd *en banc*, 723 F.3d 1114 (10th Cir. 2013) 4

Northwest Austin Municipal Utility District v. Holder, 557 U.S. 193 (2009) 5

Ran Dav Kosher, Inc. v. State, 129 N.J. 141, 608 A.2d 1353 (1992) 5

Rescue Army v. Municipal Court, 331 U.S. 549 (1947) 9

Tony and Susan Alamo Foundation v. Sec'y of Labor, 471 U.S. 290 (1985) 9

U.S. v. Lee, 455 U.S. 252 (1982) .....

CONSTITUTIONS, STATUTES, LEGISLATIVE MATERIALS

Patient Protection and Affordable Care Act, Pub.L. 111-148 2

Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1(b) 5,6,8

OTHER AUTHORITIES

Becket Fund for Religious Liberty, http://www.becketfund.org/hhsinformationcentral/ 3

S.Ct. Rule 10..... 2

AMICUS CURIAE BRIEF OF THE AMERICAN JEWISH COMMITTEE

INTEREST OF THE *AMICUS*

The American Jewish Committee (AJC), a national organization of more than 125,000 members and supporters with 26 regional offices, was founded in 1906 to protect the rights of American Jews.

AJC has a long-standing commitment to both religious liberty and equality for women. Ordinarily, these twin commitments are either entirely complementary. In rare cases—and these cases are such an instance—they clash. AJC supports judicial and legislative approaches which strive to resolve such conflicts in ways that minimize or eliminate those conflicts. Only if no such recourse exists, should the Court decide which right prevails in a particular case. AJC has as of now no position on the correct result should that clash need to be decided.

ARGUMENT[1]

I. ALTHOUGH THE PETITIONS MEET THE CRITERIA FOR REVIEW, IT WOULD BE PREMATURE TO GRANT REVIEW ON THE PRESENT RECORDS

The mirror image petitions for *certiorari* filed in these largely identical cases present a circuit conflict on an important open question of federal statutory and constitutional law: do for-profit corporations possess religious liberty rights? The Third and Tenth Circuits supplied conflicting answers. This makes for a textbook case for *certiorari* under Supreme Court Rule 10 and immediate plenary review. However, for reasons this Court has often articulated, it would be premature and imprudent for the Court to grant such review in the present posture of these cases.

Each Petition arises in connection with the mandate of the Patient Protection and Affordable Care Act, Pub.L. 111-148, that certain services, including all government approved methods of contraception, be covered by employer-subsidized health insurance policies. The corporate parties are

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[1] This brief was prepared entirely by *amicus* and its counsel. No person other than *amicus* and its counsel made any financial contribution to the preparation or submission of this brief. The parties were notified in timely fashion by letter of AJC's intention to file this brief.

owned by individuals or families with religious objections to some forms of birth control.

That issue has already generated substantial litigation (and substantial public commentary), and will likely generate still more. The website of the Becket Fund for Religious Liberty[2] lists 39 cases of this sort. By contrast, it lists only 34 lawsuits by not-for-profit religiously affiliated groups challenging the same mandate.

There are appealing arguments on both sides of the question of whether corporations enjoy religious liberty rights. Given that corporations enjoy important rights under other provisions of the First Amendment, *e.g.*, *Citizens United v. Federal Election Commission*, 553 U.S. 310 (2010), the wholesale exclusion of Free Exercise and Establishment Clause claims would lead to a checkerboard reading of the single sentence which is the First Amendment. Corporations would, for example, be proper parties to seek judicial vindication of their right to advertise contraceptives, *Bolger v. Young Drug Products Corp.*, 463 U.S. 60 (1983), but not to challenge requirements that they pay for them.

Nevertheless, a patchwork reading of the First Amendment may well be justified on its own terms,

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[2] http://www.becketfund.org/hhsinformationcentral/ (visited October 15, 2013).

as some lower courts considering corporate claims for exemption have found. Thus, the District Court in the *Hobby Lobby* case wrote eloquently. *Hobby Lobby Stores, Inc. v. Sebelius*, 820 F.Supp.2d 1278, 1291 (W.D. Okla. 2012), rev'd *en banc*, 723 F.3d 1114 (10th Cir. 2013), cited in *Conestoga Wood Specialities v. Sebelius*, 724 F.3d 377, 385 (3rd Cir. 2013), reprinted in Petition for *Certiorari*, No. 13-356 at 20a):

> General business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion they do now pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors.

The Third Circuit (and the dissenters in the Tenth) emphasized that imputing the religious beliefs of the owners to assert religious beliefs runs counter to the central principle of corporation law, which draws a sharp, almost impenetrable, line between shareholders and corporate entities. There is at present no authoritative answer to the question of which of these arguments is more persuasive.

Nevertheless, AJC urges this Court not to grant plenary review now. Instead, it believes that each of these cases should be remanded for the development

of a complete record on the issue of whether the mandate is justified by a narrowly drawn compelling interest.

It is premature to address a relatively novel question of the first order of constitutional and statutory magnitude when further litigation might allow resolution of the parties' claims on narrower, long-since settled, principles. This Court's long-standing commitment to avoiding unnecessary constitutional decision-making mandates this result. *Northwest Austin Municipal Utility District v. Holder*, 557 U.S. 193, 206 (2009), citing *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984): "[N]ormally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." Accord, *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947) (same).

If the Government is able to carry its burden of proving a compelling interest in impinging on Hobby Lobby and Conestoga Corporation's religious liberty interests (if any) sufficient to satisfy the requirements of the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1(b) (RFRA) and hence the Free Exercise Clause to the extent it applies, it would obviate the need to answer the sensitive, important and far-reaching question the parties urge this Court to resolve immediately.

Only if the Government fails to satisfy that burden would it be appropriate and essential to answer the question posed to this Court.

Each of these cases comes before this Court on an appeal of a decision granting (*Hobby Lobby*) or denying (*Conestoga Wood-Working*) a preliminary injunction against enforcement of the mandate that employer funded health insurance pay for all government recognized methods of birth control, which includes the handful of forms of contraceptives to which each corporate entity asserts it harbors religious objections (essentially post-intercourse, pre-implantation, methods).

In each case, each party made allegations about the presence or absence of a narrowly drawn compelling interest. The hurried and truncated nature of the proceedings nonetheless left the relevant issues unexplored by the adversary process. Each record falls far short of the detailed and focused inquiry RFRA mandates, 42 U.SC. 2000bb-1(b) (1-2).

This Court has read RFRA's compelling interest test to "require[ ] the Government to demonstrate that the compelling interest is satisfied through application of the challenged law 'to the person' .... [T]his Court look[s] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[s] the asserted

harm of granting specific exemptions to particular religious claimants." *Gonzalez v. O'Centro Espirito Beneficiente Uniao Do Vegetal*, 546 U.S. 418, 430-41 (2006).

We are not asserting that Free Exercise or RFRA claims are inevitably an obstacle to enforcement of the contraceptive mandate over employer religious objections. At least two state courts have held that mandatory contraception coverage in employer-sponsored health plans is constitutional even in the face of an employer's religious objections. *Catholic Charities v. Serio*, 7 N.Y.3rd 510, 859 N.E.2d 232 (2006); *Catholic Charities of Sacramento v. Superior Ct.*, 10 Cal.Rptr.3rd 283, 32 Cal.4th 527, 85 P.3d 67 (2004).

But because of the manner in which these cases have been litigated, nothing like the sort of proof this Court insisted on in *O'Centro* has been proffered. No finding of fact has been made by a trial court which would allow for informed review by this Court. Likely because of the speed with which these cases have been litigated, the Government's asserted compelling interests are stated quite generally. They are aimed at those who would refuse to pay for any form of contraception. They do not specifically address claims about a few kinds of contraceptives made by these claimants.

Whether it would be possible to procure insurance policies with such specific exclusions; what the cost to individual employees would be if they had to purchase such contraceptives themselves without the benefit of health insurance; how often such contraceptives are used; and whether there are alternative methods of providing the resisted forms of contraception to employees of objecting corporations are all open questions.

It is also unclear whether different outcomes would arise under compelling interest analysis between employers objecting to all forms of contraception and those objecting only to some, and whether this would put Government in the untenable position of appearing to favor some faiths (*e.g.*, Evangelical Protestants) over others (Catholics) depending on whether they held narrower or broader religious objections to the use of contraceptives, and whether avoiding the appearance of religious favoritism would qualify as a compelling interest.

The Government did not have occasion to address in detail the corporations' claims that there were feasible alternative methods of providing these services, such as free public clinics; tax subsidies and other federal programs. Plaintiffs (who did not have the burden of proof, 42 U.S.C. § 2000bb-1(b) and 2000bb-2(3)) equally had no occasion to flesh out their claims.

There is no reason to rush to judgment in these highly freighted cases, when a settled alternative avenue for deciding them may be available. If there proves to be no compelling interest, the issue presented can be decided later. And the question of corporate religious liberty may also arise in other contexts.

Consider:[3]

•A corporation adversely affected by Sunday Blue Laws, *Braunfeld v. Brown*, 366 U.S. 599 (1961);

•Corporations challenging requirements, allegedly in conflict with their faith, about other employee benefits (*e.g.*, social security) *U.S. v. Lee*, 455 U.S. 252 (1982); *Tony and Susan Alamo Foundation v. Sec'y of Labor*, 471 U.S. 290 (1985) (wage and hour laws);

•A food purveyor challenging a state statute allowing the state to decide that food is (or is not) kosher, *Commack Self Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415 (2nd Cir. 2002); *Ran Dav Kosher, Inc. v. State*, 129 N.J. 141, 608 A.2d 1353 (1992).

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[3] As the Free Exercise Clause appears in a single phrase with the Establishment Clause, and we can think of no reason why the two should be treated differently, we include examples of cases where corporations have raised Establishment Clause as well as Free Exercise claims as well.

•Corporations offering organized prayer meetings, invoking the Free Exercise Clause to resist application of anti-discrimination laws to bar such meetings as inherently discriminatory. *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988).

The dispute over the contraceptive mandate touches upon several of the most fundamental rights in the hierarchy of rights Americans hold dear: religious liberty; personal autonomy in making reproductive choices; and, of course, equality for women. Each of these enjoys a substantial measure of constitutional and statutory protection. Someone—ultimately this Court—must decide on how an inescapable clash between these rights is to be resolved, and how important segments of society are to be ordered.

If, in the end, those asserting religious rights must yield, it is important for them to know that they have lost because urgent, compelling and unavoidable public needs compel that result. Conversely, if the Government is unable to make out a compelling interest, and RFRA may be invoked by corporations, those pressing to enforce the contraceptive mandate universally need to know that the interests they seek to advance are too weak to override the religious liberty rights of others, and can be effectively pursued through other means.

These outcomes don't cover all eventualities—there may be no compelling interest and the Court might nonetheless hold that corporations cannot invoke RFRA (or Free Exercise Clause) rights. Even if so, there is a good chance that the parties and the public would think differently about the issue if there are judicial findings concerning the presence or absence of compelling interest.

In sum, for all the reasons that this Court has given for avoiding premature and unnecessary constitutional adjudications, see pp. 5-6, *supra*, it would be imprudent to plunge in now and set the cases for immediate plenary review.

CONCLUSION

For the reasons stated, both Petitions should be granted, the judgments vacated and the cases remanded for expedited, but thorough, presentation of evidence to determine where there exists a narrowly drawn compelling interest sufficient to justify coercing these corporate parties to comply with the mandate. [4]

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[4] We recognize that this disposition leaves open what should happen in the interim. The Third Circuit did not address the compelling interest issue at all. The Tenth gave it limited consideration, and found that, in the limited context of a request for preliminary injunction, the Government had failed to show that it had a compelling interest.

Respectfully submitted,

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Neither court (nor the district courts whose judgments were under review) engaged in the detailed fact-specific review contemplated by RFRA. Perhaps, then, the Government should be enjoined from enforcing the mandate, with its attendant penalties for failure to include a few contraceptive services, upon an undertaking by the companies to reimburse employees for actual expenses which would have been reimbursed under compliant insurance policies should the Government ultimately prevail. Perhaps other interim results are more just.